Filed 11/18/16 City of Costa Mesa v. Superior Court CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

CITY OF COSTA MESA, Petitioner, v. THE SUPERIOR COURT OF ORANGE COUNTY, Respondent; TIMOTHY DADEY et al., Real Parties in Interest.	E065582 (Super.Ct.No. 30-2014-00758104) OPINION

ORIGINAL PROCEEDINGS; petition for writ of mandate. Shelia B. Fell, Judge. Petition granted.

Jones & Mayer, James Touchstone, G. Ross Trindle III, Monica Choi Arredondo and Bruce A. Lindsay for Petitioner.

No appearance for Respondent.

Haynes and Boone, Mark D. Erickson, Mary-Christine Sungaila, Matthew E. Costello; Public Law Center, Lili V. Graham, Richard Walker; Western Center on Law and Poverty, Navneet K. Grewal, Stephanie Haffner and Richard A. Rothschild for Real Parties in Interest.

In this matter we reviewed the petition and exhibits thereto and, having concluded petitioner may have stated a basis for relief, we requested a response and stayed the action in the trial court pending adjudication of the petition. After considering the informal response by real parties in interest and the reply, we set an order to show cause. On May 10, 2016, we granted real parties in interest's April 22, 2016 motion for calendar preference because the trial court had granted an injunction, and we have processed this petition as expeditiously as possible. (Code Civ. Proc., § 527, subd. (e).) Real parties in interest chose to stand on their informal response instead of filing a return, and petitioner filed a traverse. We have considered the latter document and had already considered the former. Petitioner moved to strike portions of the traverse, and real parties in interest moved to strike portions of the opposition; we explain our ruling on that motion *post*. We now conclude the petition succeeds to the extent it shows the trial court abused its discretion by applying the wrong standard when assessing petitioner's invocation of the mental process privilege. Consequently, we grant the petition and remand to the trial court for rulings in the first instance, with directions regarding the proper standard to apply.

FACTUAL AND PROCEDURAL BACKGROUND

Petitioner, City of Costa Mesa, is the defendant in an action seeking to invalidate Costa Mesa City Ordinance No. 14-11, which restricts the duration of motel residency within petitioner's borders. The complaint alleges petitioner, by enacting the ordinance, "engaged in various forms of discriminatory conduct" and violated "federal and state laws regulating housing and relocation."

Real parties in interest served requests for production of documents on petitioner in March 2015. The requests sought a variety of documents regarding, among other things, internal communications concerning the preparation of the ordinance, the need for the ordinance, the effects of long-term motel residents on petitioner, things on which petitioner relied when adopting the ordinance, the availability of affordable housing in the City of Costa Mesa, and similar matters. Petitioner responded to the discovery demands, produced some documents, and withheld others under claims of privileges including the mental process privilege. Real parties in interest moved to compel, among other things, production of documents despite petitioner's assertion of privileges including the mental process privilege.

A discovery referee issued a report and recommendation indicating that the mental process privilege claim failed. This report addressed the claim to the mental process privilege, the official information privilege, and the deliberative process privilege collectively. The report and recommendation reads: "These privileges are not absolute and their assertion triggers [the] requirement that the court weigh the public interest supporting non-disclosure against the public interest supporting disclosure." Finding the

public's interest in disclosure outweighed any interest in confidentiality, the referee recommended the motion be granted as to any documents withheld solely due to the mental process privilege, the official information privilege, and/or the deliberative process privilege.

Petitioner objected to this recommendation, and real parties in interest filed a written response to those objections. On February 25, 2016, the trial court adopted the referee's report and recommendation, adding only that it did so "after consideration of objections [and] response."

This petition, which argues only that the trial court improperly overruled petitioner's objections based on the mental process privilege, followed. Petitioner contends the trial court erred in conducting a balancing test, which petitioner asserts is not a proper part of the mental process privilege inquiry, and asks us to order the trial court to deny the motion to compel production as to any document subject to a mental process privilege claim. While we agree the trial court used the wrong standard to assess whether the mental process privilege applies, we disagree with petitioner about the proper remedy. We therefore remand the matter to the trial court for new rulings in accordance with the instructions contained in this opinion.

DISCUSSION

"Writ review is [generally] appropriate in discovery matters 'only to review questions that are of general importance to the trial courts and the profession, and when broad principles can be enunciated to guide the courts in future cases.' " (*Doyle v. Superior Court* (1996) 50 Cal.App.4th 1878, 1883.) In addition, "The need for the

availability of the prerogative writs in discovery cases where an order of the trial court granting discovery allegedly violates a privilege of the party against whom discovery is granted, is obvious." (*Roberts v. Superior Court* (1973) 9 Cal.3d 330, 336.) Since here, petitioner will be forced to produce documents over its objection based on the mental process privilege if we do not review the trial court's order, we exercise discretion and consider the petition on the merits.

"We review discovery orders for an abuse of discretion." (*Liberty Mutual Fire Ins. Co. v. LcL Administrators, Inc.* (2008) 163 Cal.App.4th 1093, 1102.) One way for a trial court to abuse its discretion is to apply the wrong legal standard applicable to the issue at hand. (See *Doe 2 v. Superior Court* (2005) 132 Cal.App.4th 1504, 1517 [abuse of discretion where trial court applied wrong standard on claim of clergy-penitent privilege, writ relief granted]; *Venture Law Group v. Superior Court* (2004) 118 Cal.App.4th 96, 102-103 [writ relief granted where discovery order erroneously ordered attorney to violate attorney-client privilege in answering deposition questions].)

The mental process privilege rests on separation of powers principles. (See *County of Los Angeles v. Superior Court* (1975) 13 Cal.3d 721, 727, fn. 5 (*County of Los Angeles*).) " '[The] rule is general with reference to the enactments of all legislative bodies that the courts cannot inquire into the motives of the legislators in passing them, except as they may be disclosed on the face of the acts, or inferrible from their operation, considered with reference to the condition of the country and existing legislation. The motives of the legislators, considered as the purposes they had in view, will always be presumed to be to accomplish that which follows as the natural and reasonable effect of

their enactments. Their motives, considered as the moral inducement for their votes, will vary with the different members of the legislative body. The diverse character of such motives, and the impossibility of penetrating into the hearts of men and ascertaining the truth, precludes all such inquiries as impracticable and futile.' " (*Id*. at p. 726.)

Evidence Code section 1040 creates a similar but distinct privilege, which is often known as the " 'official information' " privilege. (*County of Los Angeles, supra*, 13 Cal.3d at p. 725.) It requires a court to balance "the consequences to the litigant of nondisclosure, and the consequences to the public of disclosure." (*Shepherd v. Superior Court* (1976) 17 Cal.3d 107, 126, fn. omitted, overruled on other grounds by *People v. Holloway* (2004) 33 Cal.4th 96.)

In *County of Los Angeles*, a taxpayer sued to enjoin implementation of a salary ordinance. (*County of Los Angeles, supra,* 13 Cal.3d at p. 724.) On appeal, the parties argued the official information privilege under Evidence Code section 1040 applied to their discovery dispute, with a taxpayer contending the public's interest in disclosure outweighed the public interest in confidentiality. (*County of Los Angeles*, at p. 725.) The California Supreme Court disagreed and found the mental process privilege both applied and barred the taxpayer from asking public officials deposition questions that were designed to discover whether the threat of a strike had motivated enactment of the ordinance. (*Id*. at p. 724, fn. 1.)

In so holding, the court conducted no balancing of the public's right to disclosure against the state's interest in nondisclosure. (*County of Los Angeles*, *supra*, 13 Cal.3d at pp. 726-732.) Although it acknowledged that review of "legislative abolition of civil service positions" was still possible using "objective criteria that a particular abolition was undertaken in bad faith in an attempt to circumvent applicable civil service regulations," the court noted it was "aware of no case, however, in which a court has permitted direct interrogation of legislators as to their reasons or motivation in voting on specific legislation." (*Id.* at p. 731.) Instead, the court held: "[T]he authorities make clear that the taxpayer still is not entitled to directly question the legislators as to their mental processes or their reasons for enacting the ordinance. In other words, even assuming that the ulterior purpose behind the enactment *is* relevant to the ordinance's validity, the taxpayer still may not prove such ulterior purpose by requiring legislators to testify about their reasoning process or by questioning others about the factors which may have led to the legislators' votes. Even under such circumstances, the principle barring judicially authorized inquiry of legislators' motivation remains intact." (*Id.* at p. 729.)

From this, we conclude that balancing the public interest in disclosure against the public interest in confidentiality is not a proper part of the inquiry when a court assesses a claim of mental process privilege. In this case, the discovery referee report and recommendation, which the trial court adopted without comment, addressed the mental process, official information, and deliberative process privileges under one umbrella and said each required "that the [c]ourt weigh the public interest supporting non-disclosure against the public interest supporting disclosure." Because, as we have now explained,

this kind of balancing is not part of the mental process privilege inquiry, the trial court abused its discretion.

Appellate courts are not well suited to making discovery rulings in the first instance. "Judges . . . have broad discretion in controlling the course of discovery and in making the various decisions necessitated by discovery proceedings" (*Obregon v. Superior Court* (1998) 67 Cal.App.4th 424, 431), and we do best to entrust the trial court to make rulings in the first instance with the guidance we provide *post*. In the instant case, this is particularly true for the following reasons:

First, we note the discovery referee's report and recommendation addresses all of the document demands that are apparently at issue in a global manner and makes no statements about why the mental process privilege applies to any particular category of document. As we have now explained, the referee (and the trial court, which adopted his recommendation without comment or change) improperly conducted a balancing test when assessing the mental process privilege and therefore used the wrong rule. This means no judicial officer has made a determination about whether or to what extent that privilege applies in the context of any particular item of discovery.

Even were we to attempt to undertake this task, we lack the tools to competently do so. The petition discusses no individual discovery requests, instead framing the debate as a global one regarding application of the mental process privilege to all discovery items that are at issue. Similarly, the traverse, for the first time, purports to explain why the mental recess privilege applies to specific privilege log entries, but, "[p]oints raised for the first time in a reply brief will ordinarily not be

considered." (*Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 764.) Without properly considered argument about why this privilege applies to particular demands for production of documents, we are hard-pressed to make orders about whether individual categories of documents should be produced.

Finally, the two motions to strike provide further illustration regarding why this matter is best resolved in the trial court. As indicated *ante*, the traverse contends petitioner properly withheld certain documents based on the mental process privilege. Real parties in interest moved to strike this portion of the brief on the ground that it relies on extra-record evidence. In similar fashion, petitioner moved to strike portions of the opposition that relied on extra-record evidence. The trial court is far better than we are to decide what evidence is properly in the record, and, based on its conclusions, to make rulings on the extent to which the mental process privilege applies to specific privilege log entries.

For these reasons, we remand this matter to the trial court for rulings in the first instance regarding the application of the mental process privilege to particular categories of documents. Because we are not making these rulings ourselves, we have not considered the portion of the traverse that discusses the merits of individual privilege log entries, and we express no opinion on the extent to which the traverse might rely on extra-record evidence. We have also not considered the information petitioner moved to have stricken from the opposition as relying on matters that are outside the record from the trial court. We therefore deny both motions to strike as moot.

We remand this matter, however, with directions, as we understand the mental process privilege has not received copious attention from the California Supreme Court. From *County of Los Angeles*, we know a legislator may not be forced to testify about his or her "reasoning process." (*County of Los Angeles*, *supra*, 13 Cal. 3d at p. 729.) As one court phrased it: "At least in the absence of extraordinary circumstances not presently appearing here, the question 'What were you thinking when you voted?' is probably one that cannot be asked." (*City of King City v. Community Bank of Central California* (2005) 131 Cal.App.4th 913, 944, fn. 20.) Still, and as petitioner admits, courts have allowed production of some kinds of documents in the face of claims to the mental process privilege. We agree with petitioner that, "normally courts will not invalidate legislation on the basis of illicit motives or coercive influences which may have actuated the legislators." (*County of Los Angeles*, at p. 728.) However, in some circumstances " '[l]aws are invalidated by the Court as discriminatory because they are expressions of hostility or antagonism to certain groups of individuals. . . . When and if the proscribed motives [of hostility and prejudice] replace a concern for the public good as the "purpose" of the law, there is a violation of the equal protection prohibition against discriminatory legislation.' " (*Parr v. Municipal Court* (1971) 3 Cal.3d 861, 864.)

The question, then, becomes what types of evidence are admissible to show that a legislative act is invalid because the purpose of that act is impermissible, as in *Parr*. We have already weighed in on this debate in the context of a case attempting, not to invalidate legislation, but to construe its purpose in order to determine if a local ordinance was preempted by state law. (*Bravo Vending v. City of Rancho Mirage* (1993)

16 Cal.App.4th 383, 391, 406-408 (*Bravo Vending*).) Citing *County of Los Angeles*, we observed that the purpose of legislation " 'can often be divined by examination of objective conduct rather than by the probing of subjective thoughts.' " (*Id*. at p. 407.) We also noted that, in *Terminal Plaza Corp. v. City and County of San Francisco* (1986) 186 Cal.App.3d 814, 828, the court disregarded declarations from legislators to the extent they purport to offer "the declarants' opinions, understanding and interpretations of the resolution at issue," but considered any narrative accounts of discussions and events leading up to the legislative act. (*Bravo Vending*, at p. 407.) We held we could consider all of the documents of which the party seeking to invalidate legislation sought judicial notice because, even though the opposing party objected on metal process grounds, "the arguments made, the legislative discussion concerning, and the events leading up to, the adoption and amendment of" the enactment were topics we could consider. (*Id.* at p. 408.)

As indicated *ante*, petitioner assets none of the documents currently at issue are discoverable because they are in draft form. However, there is no "legislative parol evidence rule that would . . . bar *any* extrinsic evidence (i.e., evidence outside the minutes) to determine what a local government did, or meant to do, when it cast a particular vote." (*City of King City v. Community Bank of Central California*, *supra*, 131 Cal.App.4th at p. 942.) As we have now explained, a document's status as draft or final is not the test; the test is whether the document contains the types of information we found discoverable in *Bravo Vending*. We see no reason why a document containing this

type of evidence may be withheld from discovery simply because it is a draft and not a final copy.

Again, however, determining which of the documents at issue in the parties' discovery dispute, if any, contain this type of evidence, and to what extent, is a task best suited to the trial court for reasons we have stated. We therefore remand this matter to that court with instructions to determine discoverability by looking at whether the documents petitioner has withheld pursuant to the mental process privilege contain evidence of "the arguments made, the legislative discussion concerning, and the events leading up to, the adoption and amendment of" the legislation real parties in interest challenge. (*Bravo Vending*, *supra*, 16 Cal.App.4th at p. 408.)

DISPOSITION

Let a writ of mandate issue directing the Superior Court of Orange County to vacate the February 25, 2016 order compelling petitioner to respond to the requests for production of documents as to which petitioner interposed an objection based on the mental process privilege. The trial court is to reassess applicability of this privilege in accordance with this opinion. The motion to strike portions of the traverse and the motion to strike portions of the opposition are both denied as moot.

Petitioner is directed to prepare and have the peremptory writ of mandate issued, copies served, and the original filed with the clerk of this court, together with proof of service on all parties.

Petitioner is awarded its costs on appeal.

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McKINSTER
Acting P. J.

We concur:

MILLER
J.

CODRINGTON
J.